IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 307

HARRY W. CLINE, TRUSTEE IN BANKRUPTCY OF GOLD MEDAL LAUNDRIES, INC.,

Petitioner,

vs.

ARTHUR S. KAPLAN, HARRY KOPLIN, AND BUDGET LAUNDERERS, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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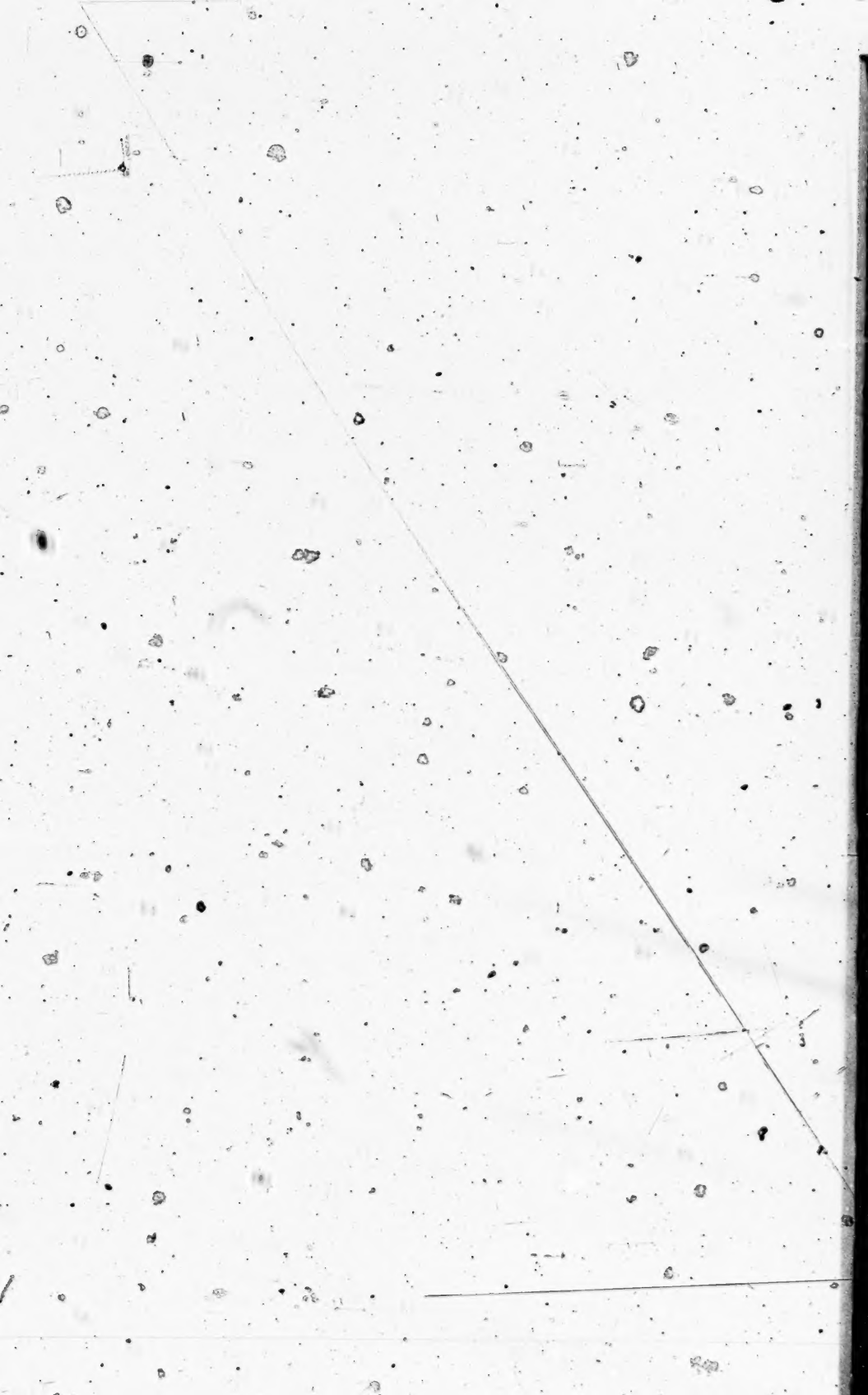

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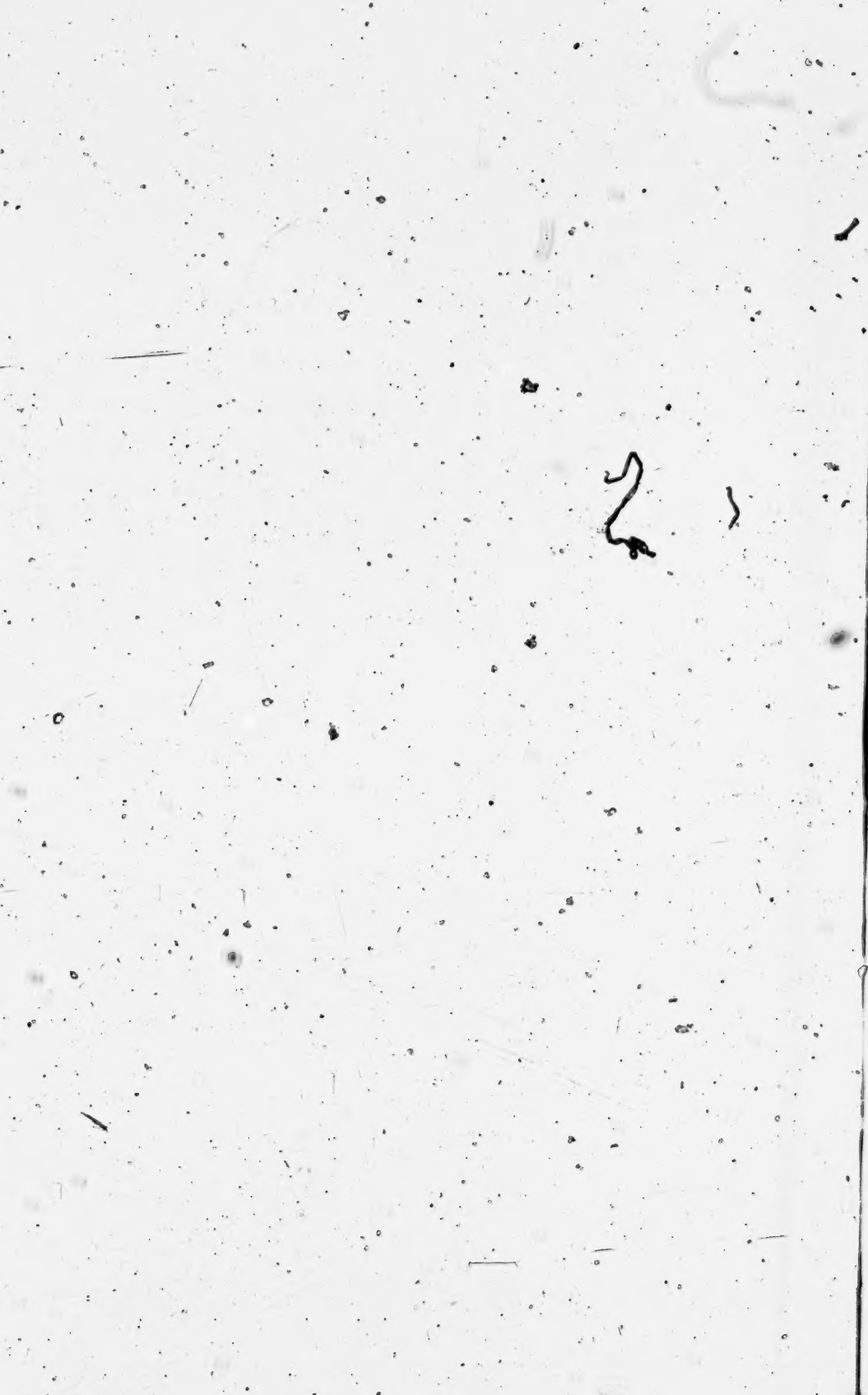

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The District Court filed a Memorandum of Opinion which appears at pages 340-343 of the Record.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit (R. 401-5) is reported at 142 Fed. (2) 301.

Jurisdiction.

The decision of the Circuit Court of Appeals was entered April 12, 1944 (R. 401-5). Petition for rehearing was denied June 6, 1944 (R. 429). The Petition for a Writ of Certiorari was filed July 31, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

Question Presented.

Whether the respondents to a trustee's petition for a turn-over order who assert at the outset in their answer their claim of adversity, may, after the introduction of testimony before the Referee, but before proofs are closed and before any order has been entered by the Referee, challenge the summary jurisdiction of the Court.

Statement of the Case.

The petitioner has not stated the case in either his Petition or Brief so as to fairly present the matter involved.

This is a bankruptcy case pending in the Northern District of Illinois, Eastern Division. The bankrupt corporation was organized on September 7, 1939 (R. 6), and engaged in the laundry business at 2621-31 W. Chicago Avenue, Chicago, Illinois, to June 12, 1940 (R. 6-9). The premises occupied by the bankrupt and the equipment used by it belonged to Maurice Ginsburg and Max Heiman (R. 7). It never belonged to the bankrupt (R. 356). On June 12, 1940, in consideration of the payment of Thirty-Nine Hundred Dollars ($3900.00) by Harry Koplin, one of the respondents, Maurice Ginsburg sold all of his interest in the premises and equipment which was being occupied and used by the bankrupt corporation (Trustee's Ex. 14; R. 124, 291). It was by virtue of this transfer that respondents acquired the property claimed by the trustee.

The involuntary petition for adjudication in bankruptcy was filed on September 22, 1941 (R. 2), fifteen months after respondents had acquired said property. The original petition of the trustee for a turn-over order was filed with the Referee on December 22, 1941 (R. 6). It is admitted in paragraphs 8 and 12 of the trustee's petition (R. 8, 9), that respondents obtained possession of the property in question on June 12, 1940, fifteen months prior to the institution of the bankruptcy.

On January 2, 1942, respondents filed their answer (R. 11) to the trustee's petition for a turn-over order, and asserted their claim of adversity therein. Their answer also asserts that none of the property, real or personal, referred to in the trustee's petition, ever belonged to the bankrupt, and prays that the petition for a turn-over order be dismissed (R. 13). The trustee, in paragraphs 8, 12 and 15 of his petition (R. 8, 9, 10), admits that respondents had actual possession of the property for more than fifteen months prior to the bankruptcy, but asserts that said possession was unlawful. Testimony was introduced before the Referee, and on the 30th day of April, 1942, respondents made an oral motion to dismiss the petition for a turn-over order on the ground that they were adverse claimants, and that the Court did not have summary jurisdiction over them (R. 266). *This motion was made before the proofs were closed* (R. 267). On May 19, 1942, said oral motion to dismiss for lack of jurisdiction was reduced to writing and filed with the Referee (R. 18-20). The statement by petitioner at page 3 with reference to proofs being closed is misleading in that it fails to refer to the oral motion made on April 30, 1942, and refers only to the written motion filed on May 19, 1942. The quotation by petitioner at page 3 from the Memorandum of Opinion by the District Court (R. 343) discloses that the Court

erroneously concluded that the summary jurisdiction was not challenged until the proofs were closed. Briefs were submitted to the Referee on the jurisdictional question, and on June 24, 1942, the Referee entered a Memorandum of Opinion and Order sustaining the motion to dismiss the trustee's petition for lack of summary jurisdiction (R. 321-323) and stated therein that the hearings were held for the purpose of determining the jurisdictional question of possession of the *res* (R. 322). On July 15, 1942, the trustee filed his petition for review of the Referee's order (R. 325). On October 22, 1942, the District Court filed its Memorandum of Opinion (R. 340), reversing the Referee's order of June 24, 1942, and concluded that respondents had consented to jurisdiction. In said Memorandum of Opinion the District Court remanded the case to the Referee for a decision on the merits.

Thereafter on June 4, 1943 the Referee filed a Memorandum of Opinion and Order dismissing on the merits, the trustee's petition for a turn-over order (R. 348-58).

Upon the trustee's petition for review of the Referee's order of January 4, 1943 (R. 359), the District Court on September 1, 1943 filed its findings of fact and conclusions of law (R. 374) and on September 9, 1943 filed its order reversing the Referee's order on the merits (R. 378).

Two appeals were prosecuted by the respondents to the Circuit Court of Appeals for the Seventh Circuit. One pertained to the order of the District Court dated October 22, 1942, reversing the order entered on June 24, 1942, by the Referee, which dismissed the trustee's petition for a turn-over order because of lack of summary jurisdiction. The other appeal pertained to the order of the District Court dated September 9, 1943, reversing the order entered by the Referee on January 4, 1943, which dismissed

on the merits the trustee's petition for a turn-over order (R. 379-385). The Circuit Court of Appeals held that respondents' objection to the summary procedure was raised in apt time and that the District Court erroneously reversed the Referee in this respect. Inasmuch as the cause was reversed on that ground, the Circuit Court of Appeals stated there was no occasion to consider the other order appealed from, that is, the order on the merits of the case, and that it perhaps would be improper to do so, as such consideration might prove prejudicial to the rights of the parties in the plenary proceeding which, as shown by the Referee's report, is pending in another Court (R. 404-05).

Since the petitioner is in error as to the state of the record, it is necessary to specifically direct attention to the quotations from the record which are set forth by the petitioner at pages 6 and 21 of his Petition and Brief.

Petitioner sets forth the following colloquy which occurred at the hearing on April 9, 1942:

> "The Court (addressing counsel for respondents): Did you attack the jurisdiction? You have answered this petition, have you not?"
>
> "Counsel for respondents: I would like leave to file a written motion and present argument on it."
>
> "The Court: I will give you leave to do that" (R. 239).

The petitioner also sets forth the following which occurred at the hearing on April 23, 1942:

> "Counsel for respondents: I am withdrawing that motion that was pending here."
>
> "The Court: All right. The record may show that the motion is withdrawn (R. 242). Leave to withdraw the motion to strike the petition for want of jurisdictio[illegible]' (R. 243).

At page 6 of the Petition, it is stated parenthetically that respondents' counsel was referring to "the motion contesting the summary jurisdiction of the Court." However, at page 21 of his Brief, petitioner states in the same manner that respondents' counsel was referring to "the motion to contest the Court's jurisdiction."

The motion referred to did not involve the question of summary jurisdiction. It related to a contest of the order of adjudication (R. 238, 242). Respondents on April 10, 1942, the day following the first hearing noted above, filed a motion to dismiss the trustee's petition on the ground that one of the petitioning creditors was disqualified and incompetent for the reasons in said motion set forth, and that the Court had no jurisdiction of the subject matter (R. 16, 17). It was this motion which was referred to and withdrawn on April 23, 1942 (R. 242, 243).

Summary of Argument.

I. This case is not one within the purview of Rule 38(5) of this Court. Opinions must be read in connection with the facts to determine whether there is a conflict: The cases cited by petitioner are distinguishable on their facts. The question involved has been settled by this Court. The conclusion of the Circuit Court of Appeals is based upon the prior applicable decisions of this Court and is not a departure from the accepted and usual course of judicial proceedings in bankruptcy.

II. A Referee in Bankruptcy may conduct extensive preliminary hearings involving the merits for the purpose of determining whether or not a claim of adversity is genuine or merely colorable.

III. The decision of the Circuit Court of Appeals is supported by *Louisville Trust Co. v. Cominger*, 184 U. S.

18, which has been repeatedly affirmed by this Court in numerous cases including *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280 and *Galbraith* v. *Vallely*, 256 U. S. 46.

The *Comingor* case requires that:

(a) An adverse respondent plead his claim of adversity at the outset, and

(b) Make his formal protest to the exercise of summary jurisdiction before a final order has been entered.

Respondents in the instant case have fulfilled the requirements of the *Comingor* case.

IV. Adverse claimants may challenge the summary jurisdiction of the Bankruptcy Court at any time prior to the entry of a final order by a Referee. The petitioner's cited cases are distinguishable on their facts and none is applicable to the instant controversy.

V. The motion challenging the summary jurisdiction of the Court was not withdrawn. Respondents filed a motion to dismiss the trustee's petition on the ground that one of the petitioning creditors was disqualified and incompetent and that the Court had no jurisdiction of the subject matter. It was this motion which was withdrawn by respondents.

ARGUMENT.

I.

This case is not one within the purview of Rule 38(5) of this Court.

Review on Writ of Certiorari under Rule 38(5) is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Such reasons do not exist in this case.

The Writ will not issue merely to afford the party defeated in the Circuit Court of Appeals another hearing, since it is fundamental that this Court will not, on Certiorari, take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result.

Opinions must be read in connection with the facts to determine whether there is a conflict. *White* v. *Aronson*, 302 U. S. 16, 21. The cases cited by petitioner are distinguishable on their facts from the instant case. That there is no conflict between the decisions of the Circuit Court of Appeals for the Seventh Circuit with the decisions of the Second and Eighth Circuit Courts of Appeals with respect to the question here involved, is shown by the fact that the Circuit Court of Appeals for the Second Circuit in the case of *In re West Produce Corp.*, 118 F. (2d) 274 cites with approval the case of *In re Murray*, 92 F. (2d) 612, decided by the Circuit Court of Appeals for the Seventh Circuit. Also, *Blachman* v. *McCluer*, 63 F. (2d) 580, decided by the Circuit Court of Appeals for the Eighth Circuit, is cited with approval in the *Murray* case.

The Writ will not be granted merely to permit the review of a determination of fact where the principles of law are well settled, nor to obtain the review of the application of settled principles where the propriety of the application is dependent upon the issues of fact peculiar to the particular case.

The Circuit Court of Appeals in deciding the instant case has followed the opinion of this Court in *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, which controls the determination of the present controversy. The *Comingor* case has been repeatedly affirmed by this Court. In none of the petitioner's cited cases has reference been made to the *Comingor* case.

The question involved has been settled by this Court, and the conclusion of the Circuit Court of Appeals is based on the prior applicable decisions of this Court and is not a departure from the accepted and usual course of judicial proceedings in bankruptcy.

This case does not require the exercise of supervision by this Court and it is therefore submitted that the Petition for a Writ should be denied.

II.

A Referee in Bankruptcy may conduct extensive preliminary hearings involving the merits for the purpose of determining whether or not a claim of adversity is genuine or merely colorable.

The Referee, in his order denying summary jurisdiction, distinctly states that he conducted the hearings for the purpose of inquiring whether the claim of adversity set up by respondents in their answer (R. 322) was substan-

tial or merely colorable. In many cases, jurisdiction may depend on the ascertainment of facts *involving the merits*, and in that sense the Court exercises jurisdiction of disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26. The Referee is in the best position to state what the nature of the inquiry was. It is true that approximately five or six hearings were had, but that is not unusual considering the nature of the issues involved. That the Referee had the right to conduct such preliminary inquiry is too well established to require any lengthy quotation from authorities. The following are the leading cases which confirm this fundamental doctrine:

Mueller v. *Nugent*, 184 U. S. 1, 15.

Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U. S. 426, 433.

Harrison v. *Chamberlin*, 271 U. S. 191, 194.

Harris v. *Avery Brundage Co.*, 305 U. S. 160, 163.

Collier on Bankruptcy, Vol. 2, 14th Ed., Sec. 23.07, and the cases cited therein.

III.

The decision of the Circuit Court of Appeals is supported by Louisville Trust Co. v. Comingor, 184 U. S. 18.

The Circuit Court of Appeals concluded that respondents' objection to the summary procedure was raised in apt time relying upon *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18 and the other cases cited in its opinion (R. 403-404).

In an analysis of *Louisville Trust Co.* v. *Comingor*, it is advisable to examine the facts, as set forth in the opinion

of the Circuit Court of Appeals, reported in 107 F. 898. The Circuit Court of Appeals summarized the facts as follows: On June 20, 1900, the Referee entered his rule against Comingor, who was a prior assignee of the bankrupt's assets, directing him to show cause why he should not return certain moneys paid to himself and to his counsel in connection with the assignment. On June 23, 1900, Comingor answered, stating that he was certain that the court would, on a full hearing, allow him at least the amount of money he had paid to himself as assignee, stating that he was a man of no means and prayed that the court give him such relief in the premises as the court deemed proper. (At this point Comingor made no objection to the court's jurisdiction, nor did he pray that the rule should be dismissed.) On June 23, 1900, the Referee made the rule absolute, and Comingor was directed to pay the money he had received as assignee to the receiver in bankruptcy. On June 28, 1900 another order was entered providing that Comingor show cause why he should not be required to pay to the receiver the money which had been paid to his attorneys. On June 30, 1900 Comingor for response to said order stated that the money was paid to his attorneys for services rendered him while he was acting as assignee and also alleged his inability to pay said money to the receiver. The foregoing response was also adjudged insufficient by the Referee. The rule was made absolute and Comingor was ordered to pay to the receiver the money he had paid to his attorneys. Thereupon Comingor prayed for a review by the Judge. In certifying the questions to the Judge, the Referee stated that Comingor was not entitled to any compensation as assignee, and, further, that he had no legal right to pay attorneys' fees and in contemplation of law must be deemed to have the funds in his possession. Pending action by the Judge on

the Referee's certificate and report, the Judge referred the case back to the Referee, to take testimony and to report what services had been rendered by Comingor and his attorneys. Comingor then appeared before the Referee on the re-reference, and proof was offered by Comingor and the trustee and stipulations were entered into with reference to the value of the services rendered by Comingor and his attorneys. On December 11, 1900, the Referee reported to the Judge that neither Comingor nor his attorneys had performed services of value and made no modification of his former report.

Continuing with its statement of the facts, the Circuit Court of Appeals, in its opinion, said that while the re-reference was pending before the Referee on November 10, 1900 (which was five months after the Referee had made the rules absolute) Comingor tendered an amended response which he offered to file, *and for the first time contested the summary jurisdiction of the Referee.* The Referee refused to entertain the amended response, and it was again tendered on the filing of the Referee's report. The District Judge affirmed the Referee's report, and held that the claim of lack of jurisdiction came too late. At page 903 of the Federal Report, it is stated:

> "We have made a somewhat detailed statement of the course of the proceedings in the case, in order to show the relation of the petitioner thereto; for it was upon the ground of the petitioner's implied consent to the mode adopted that the district judge justified it."

Further, at page 904, the Circuit Court of Appeals said:

> "But the district judge puts his conclusion upon the ground that the petitioner has acquiesced in the course pursued, by making response to the orders, asking to be relieved in the premises, and going into proof before the referee, and making stipulations concerning the proofs on the reference."

At page 906, the Circuit Court of Appeals stated:

> "We are therefore inclined to think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time he did, *which was before the making of the final order*, and that the court erred in refusing to entertain it." (Italics ours.)

The Circuit Court of Appeals set aside the orders of the Referee and the District Judge, and held that Comingor's amended response attacking the summary jurisdiction of the court was sufficient.

It appears from the foregoing statement that the *Comingor* case did not involve an *ex parte* hearing as stated by petitioner at page 15 of his Brief.

This Court in 184 U. S. 18 affirmed the Circuit Court of Appeals. Petitioner at page 15 of his Brief attempts to distinguish the *Comingor* case from the instant case upon the two following grounds:

1. That a petition was filed by the Trustee in the instant case and no element of coercion was exerted upon the respondents in our case. This statement ignores the fact that in the instant case the respondents did not appear voluntarily in this proceeding. They did not ask leave of Court to answer; but were directed by order of Court to answer the petition (R. 321). In default of a pleading the respondents would have admitted the allegations of the petition for a turn-over order. Petitioner also ignores the fact that the end sought in the *Comingor* case and in our case was identical, in the former a turn-over of money, and in the latter a turn-over of property. The consequence for failure to comply with the turn-over order in either case would have been the same—*imprisonment for contempt of court*.

2. That the respondent in the *Comingor* case pleaded his claims "at the outset." Petitioner confuses pleading the adverse claims with the question of contesting summary jurisdiction. In the *Comingor* case, this Court at page 24 stated:

> "On the face of his responses, from first to last, it appeared that Comingor insisted that the $3,200 had been paid by him to his counsel while they were acting for him, before the bankruptcy proceedings were commenced, for professional services rendered to him as assignee; and that he had retained and expended $3,398.90 as his commissions as assignee in reliance on the belief that he was entitled to that amount on final settlement. *He thus asserted a claim to each of these sums adversely to the bankrupt*, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the referee and the District Judge as being adverse." (Italics ours.)

The foregoing were the adverse claims which were pleaded at the outset. The fallacy of the trustee's contention that the respondent in the *Comingor* case attacked the jurisdiction of the Bankruptcy Court at the outset of the proceeding is evident when one examines the following statement at page 26 of this Court's opinion which held that Comingor's attack on the jurisdiction was timely because:

> "* * * he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

In the instant case the respondents at the outset asserted their claim of adversity in their answer and stated therein that none of the property, real or personal, referred to in the trustee's petition ever belonged to the bankrupt, and prayed that the petition for a turn-over order be dismissed (R. 11-13). The respondents in this case also made their

protest to the summary jurisdiction of the Court before any order was entered by the Referee (R. 18-20, 266).

Therefore in the present case the two requirements set forth in the *Comingor* case that: (1) the adverse claim be pleaded at the outset; and (2) the protest to the exercise of summary jurisdiction be made before a final order has been entered, have been fulfilled.

We further urge that the facts in the *Comingor* case are much stronger in favor of jurisdiction than the facts in the instant case. It will be noted that in the *Comingor* case the respondent did not plead lack of jurisdiction until *after* the Referee in bankruptcy had made his order and report to the Judge, and it was not until the re-reference of the matter to the Referee that Comingor first pleaded his objections. In the instant case the oral motion to dismiss was made prior to the entry of any order. This is true of the written motion to dismiss.

The *Comingor* decision has been affirmed repeatedly by this Court. It is sufficient to note *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 289-291, and *Galbraith* v. *Vallely*, 256 U. S. 46, 48-50.

In *Galbraith* v. *Vallely*, 256 U. S. 46 (cited by the Circuit Court of Appeals (R. 404)) this Court, in denying the existence of summary jurisdiction over adverse claimants, said, at page 48:

> "We think the referee was right in holding that the case was governed by *Louisville Trust Co.* v. *Comingor.*"

And continuing at page 49, it is stated:

> "* * * This case (the *Comingor* case) has been repeatedly cited as determinative of the law and practice in similar cases."

And at page 50, this Court said:

> " * * * The principle of the *Comingor* case has never been departed from in this court."

This Court also noted at page 49 that the Circuit Court of Appeals (which was reversed by this Court) had failed to make reference to the *Comingor* case.

It is therefore submitted that the *Comingor* case is decisive authority supporting the decision of the Circuit Court of Appeals that respondents challenged the summary jurisdiction of the Court in apt time.

IV.

Adverse claimants may challenge the summary jurisdiction of the Bankruptcy Court at any time prior to the entry of a final order by a Referee.

The foregoing principle is conclusively established by the *Comingor* case.

Another leading case on this proposition is *In re Bergstrom*, 1 F. (2d) 288 (C.C.A. (7)), in which a trustee in bankruptcy filed a petition for a turn-over order against successors in interest of a purchaser at a chattel mortgage sale. The transfers antedated the bankruptcy. The answers did not contest the court's jurisdiction, but prayed that the injunction be dissolved, the petition dismissed and the rule discharged. The District Court directed a turn-over. The Circuit Court of Appeals for the Seventh Circuit in reversing the District Court stated that the trustee's petition and the sworn answers, as well as the Referee's findings, conclusively indicated that the claims of respondents were based on transfers antedating the bank-

ruptcy, and that therefore their claims were substantial and not merely colorable. At page 290, the court said:

> "It is urged that the parties submitted themselves to the jurisdiction of the Court. There is no evidence of any intention to do so. The parties ask that the injunction be dissolved, the petition dismissed, and the rule discharged upon their sworn answers. *The question of procedure was raised at least 10 days before the decision, and the right to proceed summarily was directly challenged.* * * * The order of the District Court is reversed, with direction to dismiss the trustee's petition." (Italics ours.)

Another case directly in point is *In re Horgan*, 158 F. 774. In this case the Circuit Court of Appeals for the First Circuit said at page 777:

> "Upon the question of consent, it is shown that the petitioners did not voluntarily appear in the District Court, that they objected to the power of the court to make the order at the hearing, and that subsequently, and *before the entry of the final decree*, they specifically objected to the jurisdiction of the court to proceed summarily. *This was clearly sufficient under the decisions of the Supreme Court. Upon this point it is only necessary to cite Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26. The decree of the District Court is reversed, with costs for the petitioners in this Court." (Italics ours.)

To the same effect is *In re White Satin Mills, Inc.*, 25 F. (2d) 313, where the Court at page 314 said:

> "The fact that no objection was made to the jurisdiction of the referee to determine the issue in a summary proceeding, until after the testimony was heard, is probably not sufficient to justify a conclusion that the petitioner consented to the making of the order, in view of the fact that he did, *before it was made*, object." (Italics ours.)

We therefore respectfully submit that the *Comingor* case, and the cases hereinbefore set forth, which are cited by the Circuit Court of Appeals in the instant case in support of its conclusion (R. 403, 404) are determinative of the law in this case.

The Circuit Court of Appeals for the Seventh Circuit in the case of *In re Diversey Building Corp.*, 90 F. (2) 703, follows the *Comingor* and *Bergstrom* cases, and states at page 707:

> "We think this question of jurisdiction before us is controlled by the ruling in *Louisville Trust Company* v. *Comingor*, 184 U. S. 18, 22 S. Ct. 293, 296, 46 L. Ed. 413."

It is well established, therefore, that a motion contesting the summary jurisdiction of the bankruptcy court may be made at any time prior to the entry of a final order by the Referee.

At pages 16-18 of his Brief, petitioner cites the cases hereinafter set forth in support of his contention that respondents waived their privilege of demanding that the issues be heard in a plenary proceeding and impliedly consented to the summary jurisdiction of the court. None of these cases is applicable to the facts in the present case.

MacDonald v. *Plymouth County Trust Company*, 286 U. S. 263, is without application, since, as stated by this Court at page 265:

> "The respondent appeared in the proceeding, denied the material allegations of the petition; *but consented in open court* that the trial of the issues proceed before the Referee." (Italics ours.)

The Circuit Court of Appeals held that as the issues before the Referee were determinable only in a plenary

suit, the Referee, notwithstanding the consent of the parties, was without jurisdiction to decide them. The only question this Court determined was that if a party actually consents in open court to summary jurisdiction, the Referee has the power to decide the issues. Clearly, this is not our case.

It is noted that the *MacDonald* case at page 266 cites the *Comingor* case, with approval.

Petitioner in quoting from *Harris* v. *Avery Brundage Co.*, 305 U. S. 160 omits troublesome portions of this Court's opinion. The following statement, at page 163, was excluded:

> "Petitioners controlled and had custody of this Fund as agents of the Association and *did not assert any adverse interest* in themselves."

And at page 164, this Court continued:

> "Furthermore, petitioners *consented and agreed in open court* and respondents assented to the court's disposition of the Fund in a summary proceeding.
>
> "* * * No one of them—including petitioners—asserted or in any way indicated to the bankruptcy court that there could be any interest in the money distributed adverse to respondents. * * *
>
> "Petitioners having *consented* that the Fund be subject to the orders of the bankruptcy court, and that court having determined that petitioners held the Fund as agents of the Association, there was jurisdiction to enter the orders in question. Affirmed." (Italics ours.)

As stated by the Circuit Court of Appeals in the instant case:

> "It is settled that the jurisdictional defense embraces merely a procedural right and that it may be waived in the same manner as any other procedural

privilege. *MacDonald* v. *Plymouth County Trust Company*, 286 U. S. 263, 267; *Harris* v. *Avery Brundage Co.*, 305 U. S. 160, 164. *The fact that the defense may be waived, however, is of little consequence in the instant case.* The question is whether appellants waived such defense." * * * (R. 403). (Italics ours.)

Fairbanks Steam Shovel Co. v. *Wills*, 240 U. S. 642 is not pertinent. That case involved the validity of a chattel mortgage against the trustee. The Fairbanks Steam Shovel Co. without questioning the jurisdiction of the court appeared, answered and entered into a stipulation that a sale of the dredge therein involved, should proceed under an arrangement providing that if said company purchased the dredge, it should hold it subject to the decision of the controversy.

At pages 648-649, it is stated:

> "It is objected by appellant that a determination that the bankrupt corporation had its principal place of business and therefore its residence in Cook County which is in the Northern District shows at the same time that the United States District Court for the Southern District of Illinois had no jurisdiction to entertain the proceeding in bankruptcy under Section 2 of the Bankruptcy Act, and hence no jurisdiction over the present controversy." * * *

The question related to *venue* and was raised for the first time on appeal to the Circuit Court of Appeals for the Seventh Circuit. In *Diversey Building Corp.*, 90 F. (2d) 703 (C.C.A. (7)) the Court, at page 707 stated:

> "The referee's conclusion that jurisdiction was waived, which was concurred in by the court, was apparently based upon the ruling in *Fairbanks Steam Shovel Company* v. *Wills*, 240 U. S. 642, 36 S. Ct. 466, 60 L. Ed. 841, affirming a decision of this court *In re Federal Contracting Co.*, 212 F. 688. *The question*

there raised was purely one of venue. It was not set up by way of answer, and was raised for the first time, orally, in this court. The Supreme Court ruled that this court correctly held that the appellant, by answering and making defense upon the merits, consented to the jurisdiction (that is to say the venue)." (Italics ours.)

The petitioner relies heavily on *In re West Produce Corp.*, 118 F. (2d) 274 (C.C.A. (2)). The turn-over order involved certain property including an automobile. In affirming that part of the order relating to the automobile the Court stated that although it was purchased in the name of an officer of the bankrupt, the purchase price appeared to have been paid by the bankrupt and the automobile was carried on the bankrupt's books as an asset. The officer claimed that the automobile was transferred to her and pointed to an entry in the bankrupt's books indicating such a transfer with a corresponding reduction in her loan account, but the entry appeared to have been a later insertion and was attacked by the trustee as fictitious. *The District Court's order recited that the evidence established that the automobile belonged to the bankrupt's estate and was in the officer's possession or control.* The Court therefore had jurisdiction to proceed summarily, irrespective of possession, against the respondent whose claim was so unfounded as to be merely colorable and not genuine or substantial. Thus, the respondent was not entitled to a trial in a plenary suit. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 432, 433. The entire observation of the Court as to an objection to summary jurisdiction is therefore dictum. The *West Produce* case in stating that objection to summary jurisdiction comes too late if first made at the time of submission for decision, after answer and hearing on the merits is contrary to and makes no reference to the *Comingor* case. Apparently the Court's attention was not invited to said case.

It is interesting to observe that the *West Produce* case cites the following cases in support of the foregoing statement: *In re Realty Associates Securities Corp.*, 98 F. (2d) 722 (C.C.A. (2)); *First State Bank* v. *Fox*, 10 F. (2d) 116 (C.C.A. (8)) and *In re Murray*, 92 F. (2d) 612, which was decided by the Circuit Court of Appeals for the Seventh Circuit. The petitioner in the present case placed great reliance upon the *Murray* case in the Circuit Court of Appeals (R. 403). In the *Murray* case the respondent voluntarily conveyed the property to the trustee to abide the outcome of the hearing and thus consented to the summary proceedings. The surrender of possession of property to a Bankruptcy Court gives the Court jurisdiction to administer the property. *In re H. M. Kouri Corp.*, 66 F. (2d) 241, 243 (C.C.A. (2)); *In re Prokof*, 65 F. (2d) 628, 630 (C.C.A. (7)). The Circuit Court of Appeals in the instant case stated that in the *Murray* case the adverse party by his pleading and conduct consented to jurisdiction (R. 403). Petitioner now has abandoned the *Murray* case in prosecuting his present Petition.

First State Bank v. *Fox*, 10 F. (2d) 116 (C.C.A. (8)) is cited in the *West Produce* case and by the petitioner at page 17. It is clear from the opinion of the Court that no objection was made to summary jurisdiction before the Referee, and that the objection apparently was made for the first time on appeal. This would clearly make this case inapplicable in the present controversy.

In re Realty Associates Securities Corp., 98 F. (2d) 722 (C.C.A. (2)) also is cited in the *West Produce* case and by the petitioner at page 18. The question of the waiver of the privilege to attack summary jurisdiction was not involved and the statement of the Court with reference thereto is dictum. The Court stated, at page 725, that the Bankruptcy Court had jurisdiction to proceed

summarily for the reason that the property was in the hands of the bankrupt's agents or bailees and thus in the constructive possession of the Court, and also for the reason that the defense of the respondents was so unfounded as to be colorable and that they were therefore not entitled to trial in a plenary suit, citing *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 432, 433.

It is therefore submitted that the *West Produce* case and the three cases above set forth which are cited in said case are not applicable to the decision of the instant controversy.

In The Matter of Prebronx Realty Corp., 17 A.B.R. (N.S.) 346, involved a Referee's decision. Applications for turn-over orders were made against two respondents who were officers and directors of the bankrupt corporation. The applications were based on the ground that the respondents had withdrawn, without legal right, money from the corporation's funds. Sufficient proof was made of said fact. Since respondents' claim of adversity was found to be colorable, the Court had summary jurisdiction and the Referee's observation with respect to contesting said jurisdiction is dictum. It should be noted also that the Referee made no reference to the *Comingor* case or to any other leading case on this proposition.

Blachman v. *McCluer*, 63 F. (2) 580 (C. C. A. (8)) cited by petitioner at page 18 is not applicable. The Court at page 582 stated that so far as Irene Nagle (one of the respondents) was concerned:

> "She appeared in response to the order to show cause, made no objection to its sufficiency and no objection to a determination by the referee upon the merits of the controversy between herself and the trustee upon his claim that the property was in the possession of the bankrupt and belonged to the bankrupt at the time the petition in bankruptcy was filed."

At page 583 the Court continued:

> "'After the decision of the referee has been rendered, an objection to his jurisdiction comes too late:"

With respect to the claim of the other respondent, the Court at page 584 stated:

> "In addition to the power to determine whether it has possession, actual or constructive, of property claimed adversely, the court also has the power to determine whether an adverse claim is real and substantial or merely colorable. *Harrison, Trustee* v. *Chamberlin*, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897.
>
> "The court below, however, did not hold that the claim of Henry Bachman was merely colorable, but based it conclusion that it had jurisdiction upon a determination that at the time the petition was filed *it had possession of the property* which was the subject of the controversy." (Italics ours.)

It is noted that *Bachman* v. *McCluer* is cited with approval by the Circuit Court of Appeals for the Seventh Circuit in the case of *In re Murray*, 92 F. (2) 612, 614.

In re Falk, 30 F. (2) 607 (C.C.A. (2)) involved a hearing under Section 60 (d) of the Bankruptcy Act to review payments made by the bankrupt to his attorney. This section enables the trustee to safeguard the estate and to secure a summary re-examination of the propriety of a fee. The Referee directed the trustee to bring a hearing under said section. The trustee without filing a petition, as required by said section served notice of hearing on the attorney. At page 609 the Court stated that the attorney did not dispute that the Referee had jurisdiction of the subject matter and conceded that if the proceeding had been instituted upon a proper petition and the Court had held that the fee paid him was in excess of reasonable compensation, an order to return the overplus to the trus-

tee would have been the proper procedure. The Court merely held that the proceeding was summary and administrative and while the attorney was an adverse claimant, he was not one against whom a plenary suit had to be brought. The Court also held that the provision with respect to filing a petition is directory and may be waived by the appearance of the respondent, the filing by him of a petition setting forth his services and his failure to object to the form of the proceeding.

In re Lipton, 4 F. Supp. 799 (D. C. N. Y.) involved the question as to whether the trustee was entitled to the surrender value of life insurance policies issued on the life of the bankrupt. An insurance company appeared generally and answered the trustee's petition on the merits. Thereafter the respondent attempted to *withdraw* from the proceeding. The District Judge held, at page 800, that the "subsequent attempt to withdraw was plainly abortive." The opinion sets forth no facts with reference to the attempted withdrawal, and the Judge cites no authority for his conclusion. However, the case is not applicable to the facts in the instant case.

In re Franklin Brewing Co., 257 F. 135 (D. C. N. Y.) does not aid the petitioner. There the court set aside a mortgage executed by the bankrupt and thereafter the trustees in bankrupty filed a motion for an order directing the respondents to deliver for cancellation, bonds secured by said mortgage which were held by them. The motion was granted and *the bonds were surrendered.* The bankrupt had delivered to the mortgage trustee a sum of money as interest upon the bonds, which was paid to the respondents. The trustees in bankruptcy claimed the payment of said sum to the mortgage trustee and its distribution thereof were illegal because the *mortgage had been set aside and the bonds had been cancelled.* The trustee

in bankruptcy thereupon applied for an order directing respondents to pay to them the said sum and that the mortgage trustee pay so much thereof as the respondents should fail to pay.

It is noted that respondents surrendered their bonds to the trustees in bankruptcy for cancellation and thus conferred summary jurisdiction upon the Court to hear and determine all matters relating to said bonds. *Page, Trustee* v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 271.

The Court in the *Franklin* case held that since respondents and the mortgage trustee challenged the jurisdiction of the Court to compel them by summary order to turn over said money and at the same time answered on the merits, they were estopped from questioning the Court's jurisdiction over them citing *In re Kornit Mfg. Co.* (D. C. N. J.) 192 F. 392. It clearly appears that there was no question of consent to summary jurisdiction before the Court, as the respondents had by their conduct conferred upon the Court power to determine summarily the issues.

Since the *Kornit* case is the authority relied upon in the *Franklin* case, it is interesting to observe that in the *Kornit* case, the respondents were officers and agents of the bankrupt who exercised complete control and unbroken dominancy over it. In such circumstances the respondents, with respect to the property obtained by them through the action of subservient directors were held not to be adverse claimants but were treated as if they were the bankrupts. Thus in the *Kornit* case the Court had jurisdiction to proceed summarily and the statement of the Court that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits is dictum. Furthermore, the case of *In re Olweiss*, 10 F. Supp. 743 decided by the District Court of New York expressly repudiates the *Franklin* case and holds that the statement in said case

with respect to the waiver of jurisdiction "is only dictum and is against the authoritative decisions," citing the *Comingor* case and *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280 as authority for its conclusion.

In re Ackermann, 82 F. (2d) 971 (C. C. A. (6)), is cited by petitioner at page 18. A reading of the case and reference to petitioner's quotation therefrom readily discloses that the case is of no assistance in the determination of the decision in the instant case. Obviously, if objection was not made by the respondent in that case to the power of the Court to entertain the petition for a turn-over order on the ground that he was an adverse claimant, consent to adjudication thereon was inferable.

In re Latex Drilling Co., 11 F. (2) 373 (D. C. W. D. La.), requires no comment other than the statement that all parties appeared voluntarily in the proceeding. The only question raised was that the Court determine the party entitled to receive the money involved.

The abstract propositions from textbooks cited by petitioner at page 19 afford no aid in the determination of this controversy. Since questions of waiver and consent relate to particular factual situations, the facts in each case must be examined. With this in mind, we have included in our analysis of petitioner's cited cases, a presentation of the facts therein involved.

It may be briefly noted, however, that the quotation from *Remington on Bankruptcy*, Vol. 5, pages 338-39 with reference to the joinder of defenses is predicated on *In re Kornit Mfg. Co.*, 192 F. 392; *In re Franklin Brewing Co.*, 257 F. 135, and *Sheppard* v. *Lincoln*, 184 F. 182 (D. C. N. Y.). As hereinbefore stated, the *Kornit* and *Franklin* cases have

been repudiated. The *Sheppard* case is to the same effect as said two cases.

The quotation from Corpus Juris Secundum, Vol. 8 (Bankruptcy), pages 1124-25, is incomplete and should be:

> "• • • by answering on the merits he waives objection to summary jurisdiction *under some authorities.*" (Italics ours.)

The authorities cited for the foregoing statement are: *In re Lipton*, 4 F. Supp. 799, (D. C. N. Y.), which has been hereinbefore set forth, and *In re Franklin Brewing Company*, 257 F. 135.

It is therefore respectfully submitted that petitioner's cases are not in point, are readily distinguishable on their facts, and are not determinative of the controversy in the instant case.

Petitioner, at page 20, states that the decision of the Circuit Court of Appeals places the petitioner in a disadvantageous position. The record in this case discloses that the respondents have been subjected to prolonged litigation in two proceedings. It is a matter of extreme importance in this case that the petitioner admits in his petition for a turn-over order (R. 8, 9, 10) and the Referee found (R. 322) that respondents had actual possession of the property involved under a claim of title for fifteen months prior to the bankruptcy.

The Circuit Court of Appeals stated:

> "• • • There is no dispute but that appellants obtained possession of the property in question on June 12, 1940, fifteen months prior to the institution of bankruptcy. Furthermore, it is conceded by all parties, and so recognized by the lower court, that appellants are adverse parties" (R. 402).

In view of these facts, the petitioner, feeling insecure, as to his right to relief in a summary proceeding, instituted a plenary suit in another court (R. 323, 404, 405). Therefore the respondents have been put to the burden and expense of defending the instant proceeding before the Referee, the District Court, the Circuit Court of Appeals, and in this Court. In addition, the respondents are required to make their defense in the plenary suit. The burden thus has been placed upon the respondents by the trustee who has sought two opportunities to litigate the same issues by the institution of a summary proceeding and a plenary suit.

V.

The motion challenging the summary jurisdiction of the court was not withdrawn.

Petitioner at page 22 of his Brief states:

> "Counsel for respondents specifically asked leave to file a written motion and argument attacking the *summary jurisdiction* of the court and this after the court had informed him that respondents had answered the petition. Subsequently counsel for respondents expressly *withdrew* their motion." (Italics ours.)

This statement is not correct.

As hereinbefore set forth in our "Statement of the Case," the quotations from the record by petitioner at pages 6 and 21 of his Petition and Brief do not relate to the motion contesting the summary jurisdiction, but refer to a contest of the order of adjudication (R. 238, 242). Respondents filed a motion to dismiss the trustee's petition on the ground that one of the petitioning creditors was disqualified and incompetent for the reasons in said mo-

tion set forth, and that the Court had no jurisdiction of the subject matter (R. 16, 17). It was this motion which was referred to and withdrawn (R. 242, 243).

The oral motion contesting the summary jurisdiction (R. 266) and the written motion challenging said jurisdiction (R. 18-20) were not withdrawn.

Petitioner's argument that a colloquy in the instant case was sufficient to manifest consent to summary jurisdiction is based on an erroneous statement of fact.

Plymouth County Trust Company v. *MacDonald*, 53 F. (2d) 827, cited by petitioner at page 21, is not, in any event, applicable to the present case. In that case counsel for the respondent *expressly consented* in open court to summary jurisdiction upon the understanding that the summary proceeding be conducted under the rules of evidence in a plenary suit. The Circuit Court of Appeals for the First Circuit held that as the issues before the Referee were determinable only in a plenary suit, the Referee, notwithstanding the consent of the parties, was without jurisdiction to decide them. This Court in 286 U. S. 263 *reversed* and held that by the consent of the respondent in open court, the Referee had power to decide the issues.

The case *was not affirmed* by this Court as stated by petitioner at page 21.

Petitioner states at page 22 that the decision below affords the respondents two trials and leads to a result grossly inequitable to the trustee. As we have heretofore set forth, it is the trustee who has sought two trials, by the institution of summary and plenary proceedings. The trustee will not be required to institute a suit in another Court, for he already has done that. As to respondents acquiring full knowledge of the trustee's case, and govern-

ing themselves accordingly at a second trial, petitioner ignores the fact that in a summary proceeding in which jurisdiction is challenged, both the trustee and respondents are required to introduce evidence involving the merits in order that the Court may inquire whether the claim of adversity is substantial or merely colorable.

CONCLUSION.

The decision of the Circuit Court of Appeals is clearly correct. It is based on the applicable decisions of this Court and does not depart from the accepted and usual course of judicial proceedings. Since the petitioner has shown no sufficient reason for review by this Court of said decision, it is respectfully submitted that his Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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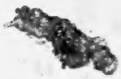

SUPREME COURT OF THE UNITED STATES.

No. 307.—October Term, 1944.

Harry W. Cline, Trustee in Bankruptcy of Gold Medal Laundries, Inc., Petitioner,

vs.

Arthur S. Kaplan, Harry Kaplin, and Budget Launderers, Inc., Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 4, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case concerns the powers of a bankruptcy court when a claim adverse to the bankrupt estate is asserted.

An involuntary petition for adjudication in bankruptcy was filed against Gold Medal Laundries on September 22, 1941. A month later the adjudication was made. On December 22, petitioner, the trustee in bankruptcy, filed with the referee a petition for an order directing the respondents to turn over certain assets, allegedly belonging to the bankrupt, which had come into possession of the respondents some fifteen months prior to the institution of the bankruptcy proceedings. Respondents' answer claimed ownership in themselves and prayed dismissal of the petition. Extensive hearings were held to determine whether the property was in the constructive possession of the bankrupt. Prior to the close of the hearings respondents orally moved that the petition be dismissed for want of summary jurisdiction and a formal motion to this effect was filed on May 19, 1942. On June 24, 1942, the referee granted this motion. The District Court reversed, whereupon the referee denied a turnover order on the merits and the District Court again reversed. Appeals from both decisions of the District Court were taken to the Circuit Court of Appeals for the Seventh Circuit. Having found that the objection to the summary jurisdiction had been timely and had not been waived, that court sustained the referee's dismissal for lack of jurisdiction. 142 F. 2d 301. Conflicting views having been expressed in different circuits on matters affecting bankruptcy ad-

ministration which ought not to be left in doubt, we granted certiorari. 323 U. S. —.

A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated "in suits of the ordinary character, with the rights and remedies incident thereto". *Galbraith* v. *Vallely*, 256 U. S. 46, 50; *Taubel, etc., Co.* v. *Fox*, 264 U. S. 426. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. *Harrison* v. *Chamberlin*, 271 U. S. 191, 194. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25-26. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263.

Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure to make timely objection. *MacDonald* v. *Plymouth County Trust Co.*, *supra* at 266-267. Consent is wanting where the claimant has throughout resisted the petition for a turnover order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order. *Louisville Trust Co.* v. *Comingor*, *supra*. In the *Comingor* case although the claimant "participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered". *Id.* at 26. This, it was held, negatived consent and thereby the right to proceed summarily.

Thus, what a bankruptcy court may do and what it may not do when a petition for a turnover order is resisted by an adverse

claimant is clear enough. But whether or not there was the necessary consent upon which its power to proceed may depend is, as is so often true in determining consent, a question depending on the facts of the particular case. And so we turn to the facts of this case.

When the trustee filed his petition for a turnover order, respondents denied any basis for such an order and asserted their adverse claim. There is no dispute about that. Before the matter went to the referee for determination, respondents explicitly raised objection to the disposition of their claim by summary procedure. They later amplified that objection by a written motion and supported it by extended argument. The established practice based on the criteria of the *Comingor* case was thus entirely satisfied. We reject the suggestion that respondents conferred consent by participating in the hearing on the merits. See *In re West Produce Corp.*, 118 F. 2d 274, 277. In view of the referee's opinion that the hearings were held to determine whether the bankrupt had constructive possession of the property, the petitioner can hardly claim the benefit of the restricted rule which he invokes. In any event, such a view is contrary to that which was decided in *Louisville Trust Co.* v. *Comingor, supra*, which held, as we have noted, that consent is not given even though claimant "participated in the proceedings" provided formal objection to summary jurisdiction is made before entry of the final order. And the *Comingor* case "has been repeatedly cited as determinative of the law and practice in similar cases". *Galbraith* v. *Vallely*, 256 U. S. 46, 49.

We find no merit in other questions raised by the petitioner. But they do not call for elaboration.

Affirmed.